

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

GREGORY W. STEWART,

Petitioner,

v.

J. MACOMBER,

Respondent.

No. 1:21-cv-00063-DAD-HBK (HC)

ORDER ADOPTING FINDINGS AND
RECOMMENDATIONS AND DISMISSING
PETITION

(Doc. No. 9)

Petitioner Gregory W. Stewart is a state prisoner proceeding *pro se* and *in forma pauperis* with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. (Doc. No. 1.) The matter was referred to a United States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1) and Local Rule 302.

On March 10, 2021, the assigned magistrate judge issued findings and recommendations, recommending that the pending petition be dismissed because it is successive and petitioner has not obtained leave from the Ninth Circuit to proceed with a second or successive petition. (Doc. No. 9.) The pending findings and recommendations were served on petitioner with notice that any objections thereto were to be filed within thirty (30) days of service. (*Id.* at 3.) On April 7, 2021, petitioner filed a motion for reconsideration and objections to the findings and recommendations, which the court construes as petitioner's objections to the findings and

1 recommendations. (Doc. No. 11.) Those objections do not appear to address the fact that
2 petitioner has not obtained an order from the Ninth Circuit authorizing him to file a second or
3 successive petition.

4 In addition, having concluded that the pending petition must be dismissed, the court now
5 turns to whether a certificate of appealability should issue. A state prisoner seeking a writ of
6 habeas corpus has no absolute entitlement to appeal a district court's denial of his petition, and an
7 appeal is only allowed in certain circumstances. *Miller-El v. Cockrell*, 537 U.S. 322, 335–36
8 (2003); 28 U.S.C. § 2253. Where, as here, the court denies habeas relief on procedural grounds
9 without reaching the underlying constitutional claims, the court should issue a certificate of
10 appealability “if jurists of reason would find it debatable whether the petition states a valid claim
11 of the denial of a constitutional right and that jurists of reason would find it debatable whether the
12 district court was correct in its procedural ruling.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).
13 In the present case, the court finds that reasonable jurists would not find the court's determination
14 that the petition should be dismissed debatable or wrong, or that petitioner should be allowed to
15 proceed further. Therefore, the court declines to issue a certificate of appealability.

16 Accordingly,

- 17 1. The findings and recommendations issued on March 10, 2021 (Doc. No. 9) are
18 adopted in full;
- 19 2. The petition for writ of habeas corpus is dismissed;
- 20 3. The court declines to issue a certificate of appealability; and
- 21 4. The Clerk of the Court is directed to close this case.

22 IT IS SO ORDERED.

23 Dated: **April 23, 2021**

24 
UNITED STATES DISTRICT JUDGE